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FILED
MAR 25 1905
JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States.

DANIEL R. KENDALL,
Appellant,

against

THE AMERICAN AUTOMATIC LOOM COMPANY,
Appellee.

October Term, 1904. No. 541.

Comes now the appellant by his counsel appearing in that behalf, and moves the court to advance the above case on the calendar under rule 32 of the Rules of the Supreme Court of the United States on the ground that this case is brought to this court by appeal under section 5 of the Act of March 3, 1891, chapter 517, in that the only question in issue is the question of the jurisdiction of the Circuit Court for the Southern District of New York.

NOAH C. ROGERS,
Counsel for Appellant,
31 Nassau Street, Manhattan,
New York City.

To Messrs. SIMPSON, WERNER & CARDOZO,
Solicitors for the Appellee, appearing specially for the purpose of questioning the jurisdiction of the court.

Please take notice that on Monday, the 27th day of March, 1905, at the opening of the Court or as soon thereafter as counsel can be heard the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the said Court thereon. Annexed hereto is a copy of the affiadvit of Noah C. Rogers, verified the 16th day of March, 1905, to be submitted with the said motion in support thereof.

NOAH C. ROGERS,
Counsel for the Appellant,
31 Nassau Street, Manhattan,
New York City.

IN THE SUPREME COURT OF THE UNITED STATES.

DANIEL R. KENDALL,
Appellant,

against

THE AMERICAN AUTOMATIC LOOM COMPANY,
Appellee.

October Term, 1904. No. 541.

STATE OF NEW YORK,
County of New York, } ss.:

NOAH C. ROGERS, being duly sworn, deposes and says:

That this action was commenced in the Circuit Court of the United States for the Southern District of New York on the 13th day of December, 1904, by the service of the bill of complaint herein and a writ of subpœna upon one Joseph H. Emery, as Treasurer of the appellee herein, by an United States Marshal; that on the 20th day of December, 1904, the appellee appeared herein specially for the sole purpose of questioning the jurisdiction of the said United States Circuit Court for the Southern District of New York, by Messrs. Simpson, Werner & Cardozo, and on the 23rd day of December, 1904, moved the said Cir-

cuit Court for an order setting aside the said service of the writ of subpoena and bill of complaint herein on the ground that the said service was ineffectual and illegal in that the said Circuit Court had no jurisdiction of the action; that the said motion was granted and an order was entered in the office of the Clerk of the said Circuit Court on the 5th day of January, 1905, setting aside and declaring null and void the said service of the writ of subpoena and bill of complaint herein from which order the appellant appealed to this Court on the 18th day of February, 1905. That the only question at issue in this appeal is the jurisdiction of the said Circuit Court.

NOAH C. ROGERS.

Sworn to before me this
16th day of March, 1905.
HOWARD CARTER,
Commissioner of Deeds,
City of New York.

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Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

In the Supreme Court of United States.

DANIEL R. KENDALL,
Appellant,

against

THE AMERICAN AUTOMATIC LOOM COMPANY,
Appellee.

October Term, 1904. No. 541. Appellant's Brief.

Statement.

This is a motion to advance this appeal to the motion calendar under rule 32 of the Supreme Court rules. It appears from the record of the Bill of Complaint on file with this court that the suit was brought on the equity side of the Circuit Court for the Southern District of New York praying that a receiver be appointed of the property of the defendant corporation. The corporation had been organized under the laws of West Virginia. Plaintiff was a resident of N. Y. City. The suit was brought in the said Circuit Court because of diverse citizenship. The writ of subpœna was served on the defendant by delivering it to its treasurer, Joseph H. Emery, within the Southern District of New York. Thereafter the defendant appeared specially and moved to set the service aside on the ground that the said

Emery was not at the time of said service representing the defendant in said District and an order was made by the said Circuit Court setting aside the said service and refusing to entertain jurisdiction on that ground.

It is from this order the complainant has appealed to this Court.

Assignment of Errors.

I.—That the matters set out in the moving papers of the defendant are not sufficient to sustain the order setting aside the service of process in this suit.

II.—That the United States Circuit Court for the Southern District of New York has jurisdiction over the defendant corporation by reason of the service of the writ of subpœna made by the United States Marshal herein.

III.—That the principal office of the said corporation is by its charter fixed and located in the said Southern District of New York, by reason of which service of process upon the Treasurer of the said defendant who resides in said District is sufficient to confer jurisdiction upon the said Circuit Court.

IV.—That the Circuit Court of the United States for the Southern District of New York erred in setting aside the said service of process.

Points.

This appeal is properly taken to this Court and because the sole question is the Circuit Courts jurisdiction this motion to advance the appeal should be granted.

Gooey *vs.* Morning News, 156 U. S. 518.

Rules U. S. Supreme Court No. 32.

Respectfully submitted,

NOAH C. RODGERS,
Of Counsel for Appellant,
31 Nassau St.,
New York City.

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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

DANIEL R. KENDALL,
Appellant,

against

THE AMERICAN AUTOMATIC LOOM COMPANY,
Appellee.

October Term, 1904.
No. 541
Appellant's Brief.

Statement.

This is an appeal from an order of the United States Circuit Court, Southern District of New York, granting the appellee's motion to set aside the service of the writ of subpœna on its treasurer (print page 14). The service of the subpœna was set aside on the moving affidavit of Joseph H. Emery, the treasurer served, setting forth that the American Automatic Loom Company is a West Virginia corporation; that it had never manufactured nor sold any merchandise, nor engaged in the business for which it was incorporated; that it has no assets, nor office in the State of New York,

where its treasurer was served, and that those of the corporation's officers who reside in the State of New York are not there officially (print p. 8).

On the other hand, it appears that the certificate of incorporation of the defendant company fixed the principal office of the company in the City, County and State of New York (print p. 2, paragraph 2nd of bill of complaint); that each and every one of the incorporators of the defendant company resided in New York (print p. 11); that all of the meetings of stockholders and directors that were held by the company were held in New York City (print p. 9-11).

The company claims that its sole assets are two looms, some tools and machinery used in making them, and its patents, which are in Attleboro, Massachusetts; that the company has never reached the stage of transacting business, and that an action has been commenced by the State of West Virginia to terminate its corporate franchise by reason of non-payment of taxes (print p. 10). However, it appears from letters submitted by the plaintiff on this motion that on January 20, 1903, certain people were looking at the company's patents, and that it was continuing with its work at Attleboro (print p. 13), and on April 3, 1902, the loom was running as high as two hundred and ten picks and making cloth as good as any made (print p. 14).

Assignment of Errors.

I.—That the matters set out in the moving papers of the defendant are not sufficient to sus-

tain the order setting aside the service of process in this suit.

II.—That the United States Circuit Court for the Southern District of New York has jurisdiction over the defendant corporation by reason of the service of the writ of subpœna made by the United States Marshal herein.

III.—That the principal office of the said corporation is by its charter fixed and located in the said Southern District of New York, by reason of which service of process upon the treasurer of the said defendant, who resides in said District, is sufficient to confer jurisdiction upon the said Circuit Court.

IV.—That the Circuit Court of the United States for the Southern District of New York erred in setting aside the service.

FIRST POINT.

The defendant is subject to the jurisdiction of the New York Court by the provision in its articles of incorporation fixing its principal place of business there.

People *vs.* Trustees of Geneva College, 5 Wendell (N. Y.), 211.

Attorney General *vs.* Oakland Co. Bank, 1 Walker C. L. (Mich.), 90, 97.

Having made it one of the conditions of its creation that its principal place of business should be in the City, County and State of New York (print p. 2, paragraph second of complaint; see also admission of defendant print p. 10 last paragraph Emery's affidavit), it will not be heard now to deny this jurisdiction. The defendant has done nothing to amend its charter, nor to revoke the agency of its treasurer Emery; nor to withdraw its place of business to another jurisdiction.

In Canada Southern R. Co. *v.* Gebhard (109 U. S. 527, 537) it was held "A corporation must dwell in the place of its creation and cannot migrate to another sovereignty, though it may do business in all places where its charter allows and the local laws do not forbid. But wherever it goes for business it carries its charter as that is the law of its existence, and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere."

If strangers dealing with the corporation are thus bound by the terms of its charter much more is the corporation itself estopped from denying a plain condition of its incorporation especially after it has adopted and lived pursuant to the condition in so far as it has existed at all; as will more fully appear in the next point.

LAST POINT.

The service of the writ of subpoena on the defendant's treasurer was sufficient to give the Court jurisdiction.

Amer. Locom. Co. *vs.* Dickson Co., 117 Fed., 972.
McCord Lumber Co. *vs.* Doyle, 97 Fed., 22.
Conn. Mut. Life Ins. Co. *vs.* Spratley, 172 U. S., 602.
Merchants Mfg. Co. *vs.* Grand Trunk Ry. Co., 13 Fed., 358.

If the service in question had been made in 1898, the year of incorporation, instead of 1904, it is difficult to see what valid objection could have been made to it. The charter of the defendant located its principal office or place of business in the City of New York. Its incorporators resided there; its treasurer, who was served, lived there; its directors and stockholders' meetings were held there. In all respects, except in the State of its creation, it was a New York corporation. No steps have been taken since then by the defendant to change the *statu quo;* its charter has not been amended; no office or place of business has been established in another State; no new treasurer or representative residing or acting in another State has been selected; nor have the meetings of directors or stockholders been held anywhere else than in New York; but the defendant claims that it has ceased to do any business;

that its very inactivity has removed it from the jurisdiction of the New York Courts.

That this inactivity was gradual and with no intention to alter its charter as to where its principal place of business should be located is evident. In the year 1901 the last stockholders and directors' meetings were held (p. 9); in 1902 one of the looms was running 210 picks, making cloth as good as any made, and the other was in process of construction (p. 14); in 1903 people were looking into the defendant's patents, and in the meantime the work at Attleboro was continuing (p. 13); in 1904 Mr. Emery writes: "I am advised that, as treasurer of the company, I have no authority to prepare a statement that would bind the Board of Directors;" and in the same year an action had been commenced by the State of West Virginia against it to forfeit and terminate its corporate franchise (p. 10).

It is plain therefore that no steps have been taken to dissolve or wind up the affairs of the corporation by its directors; nor have any steps been taken toward realizing and distributing the proceeds of its patents and other assets, which is the object of this suit.

The sole object of serving the subpœna is to give the corporation notice of the suit. This object was attained here; since the defendant at once appeared specially by its attorneys to object to the service.

Respectfully submitted,

NOAH C. ROGERS,
of Counsel for Appellant,
31 Nassau Street,
New York City.

IN THE

Supreme Court of the United States.

DANIEL R. KENDALL,
Appellant,

AGAINST

THE AMERICAN AUTOMATIC LOOM COMPANY,
Appellee.

October Term, 1904.
No. 541.

Affidavit in opposition to motion to advance cause.

STATE OF NEW YORK, }
County of New York, } ss:

BENJAMIN N. CARDOZO, being duly sworn, deposes and says: I am the counsel for the appellee herein. The complainant is a citizen of the State of New York, and a resident of the Southern District of New York. The defendant is a corporation organized under the laws of the State of West Virginia, and is a citizen of that State. The writ of subpœna and bill of complaint were served in the Southern District of New York on the defendant's treasurer. The defendant, appearing specially for that purpose, thereupon moved the Circuit Court to set aside the service on the ground that the defendant was a corporation organized under the laws of West Virginia; that it was not engaged in business and had no property in the State of New York; that its treasurer, on whom process had been served,

was not in the State of New York officially, or as representing any business or interest of the corporation; and that the defendant, under these circumstances, had not been brought into court by any legal service. No question was raised as to the jurisdiction of the subject matter of the cause. The sole question was whether the attempted service of process was effectual and legal. The Circuit Court sustained the defendant's contention that the service was void, and an order was made setting it aside.

I respectfully submit that no question is in issue as to the jurisdiction of the court below.

Sworn to before me, this 23rd day of March, 1905. Benjamin N. Co

(Seal) W. J. Laing

NOTARY PUBLIC, KINGS CO.
CFT. FILED IN N. Y. CO.